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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
3 -----x

4 UNITED STATES OF AMERICA,

5 v.

11 Civ. 4139

6 ROJADIRECTA.ORG  
7 and ROJADIRECTA.COM,

8 Defendants.  
9 -----x

10 December 6, 2011  
11 3:30 p.m.

12 Before:

13 HON. PAUL A. CROTTY  
14 APPEARANCES

15 PREET BHARARA  
16 United States Attorney for the  
17 Southern District of New York  
18 BY: CHRISTOPHER FREY  
19 DAVID MILLER  
20 Assistant United States Attorneys

21 DURIE TANGRI LLP  
22 Attorney for Defendants  
23 BY: RAGESH TANGRI

24 SPEARS & IMES LLP  
25 Attorney for Defendants  
BY: DAVID SPEARS

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1 (Case called)

2 (In open court)

3 MR. FREY: Good afternoon, your Honor. Christopher  
4 Frey and David Miller for the government.

5 MR. MILLER: Good afternoon, your Honor.

6 THE COURT: Mr. Frey, Mr. Miller, how are you?

7 What happened to your colleague?

8 MR. TANGRI: He just stepped out for a moment. I  
9 think he is coming back. We can proceed. I don't want to take  
10 up the court's time. Ragash Tangri for the Puerto 80.

11 THE COURT: OK, Mr. Tangri. And who is with you?

12 MR. TANGRI: David Spears. Mr. Spears and I.

13 THE COURT: We will just wait a minute. Here is  
14 Mr. Spears now.

15 Mr. Tangri, are you going to start off?

16 MR. TANGRI: Yes, your Honor.

17 THE COURT: OK.

18 MR. TANGRI: Good afternoon, your Honor. As we  
19 explained in the briefing, we believe that the government has  
20 over the course of this matter fundamentally shifted its  
21 position. The theory of the case that it is advancing now is  
22 not one that it pled in its complaint. In light of that, I'm  
23 going to say briefly what I believe the government is no longer  
24 alleging and then talk about what I think its new theory of the  
25 case is, and address why that theory, even if it were pled,

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1 would not state a claim.

2 I think everyone agrees that the government can only  
3 plead forfeiture if the domain names were used to commit or to  
4 facilitate the commission of a crime, and I think that everyone  
5 agrees here that the crime that is alleged to have been  
6 committed is criminal copyright infringement.

7 The question and where the shift has occurred is who  
8 it is that the government is alleging has committed the  
9 criminal copyright infringement. I think the complaint as  
10 drafted, especially in paragraph 24, alleges that  
11 Rojadirecta -- or Puerto 80 through the Rojadirecta site --  
12 committed criminal copyright infringement, and as we recited in  
13 our reply --

14 THE COURT: Let me get to paragraph 24. That they  
15 constituted property used or intended to be used to willfully  
16 infringe a copyright. All right.

17 MR. TANGRI: That's the operative allegation in the  
18 complaint as we read it. And as we cited in our reply brief at  
19 pages 2 through 3 there are a number of pleadings that the  
20 government has filed in this case taking the position that it  
21 was Puerto 80 that was responsible for criminal copyright  
22 infringement. That I think is what has now changed.

23 As I read the government's opposition brief, they are  
24 no longer saying that Puerto 80 committed criminal copyright  
25 infringement; they are now saying that some other website or

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1 websites, to which Puerto 80's website linked, commit criminal  
2 copyright infringement.

3 THE COURT: How does this work, Mr. Tangri? I go on  
4 Rojadirecta.com or .org and a get a menu of games. Is that  
5 correct so far?

6 MR. TANGRI: That is one of the things you can get  
7 there, your Honor, but, yes, that is correct.

8 THE COURT: I mean that's the one that brings us here  
9 today, right?

10 MR. TANGRI: That's the one that brings us here today.

11 THE COURT: Then I can hit on a game? Or link on a  
12 game?

13 MR. TANGRI: You click on what is a link on the  
14 Rojadirecta site.

15 THE COURT: And what happens then?

16 MR. TANGRI: A new window comes up in your browser,  
17 and you are taken to another website from which a telecast of  
18 that game is being streamed. There is no allegation in the  
19 complaint -- and I believe it's conceded by the government and  
20 by the government agent's affidavit that supported the  
21 forfeiture warrant -- there is no allegation that any of this  
22 allegedly infringing content resides on Rojadirecta's website,  
23 and therefore there is no allegation that it is streamed from  
24 Rojadirecta's website.

25 THE COURT: You say allegedly copyrighted material.

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1 There is no doubt that the material that's being streamed is  
2 copyrighted.

3 MR. TANGRI: Your Honor, I think at this stage of the  
4 proceeding the allegation in the complaint -- which we have to  
5 take at face value for 12(b)(6) purposes -- is that the  
6 material is copyrighted.

7 THE COURT: Right.

8 MR. TANGRI: Whether or not -- and this is I think is  
9 an important point that I was planning to turn to in a moment,  
10 but let me --

11 THE COURT: I don't want to take you out of the order  
12 of your argument.

13 MR. TANGRI: No, that's fine. There is a difference  
14 between displaying copyrighted material and making an  
15 unauthorized display of copyrighted material. In other words  
16 --

17 THE COURT: Is this your display and dissemination  
18 distinction?

19 MR. TANGRI: No, this is a different distinction, your  
20 Honor. This is a distinction that relates to the willfulness  
21 argument. So, perhaps I will save it for there, but I just  
22 wanted to footnote the point.

23 It's not necessarily clear that all of this material  
24 that's being streamed from these other websites is on those  
25 websites without people's authorization.

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1           There is certainly allegations in the complaint that  
2 some of the material that was viewed by the agents was posted  
3 on some other website without authorization. That's alleged.  
4 But it is not the case that all sports telecasts that can be  
5 linked to on the Internet are up there without the  
6 authorization of the copywriter.

7           THE COURT: Now, when I hit on the link  
8 Rojadirecta.com or .org and I go to the streaming sports event,  
9 am I correct that there is something that indicates that it's  
10 Rojadirecta in the browser, there is a URL that says  
11 Rojadirecta on it?

12           MR. TANGRI: There is a you URL that begins with  
13 Rojadirecta, and then there is a slash, and then there is the  
14 name of the other website. This is a common convention or form  
15 on the Internet in which this is how one site can deliver  
16 content from another site to which it is linking.

17           If you took that URL and you highlighted the  
18 Rojadirecta part of it and you deleted it, so that instead of  
19 saying www.rojadirecta.com/sportsisus -- I am making that up --  
20 .com/, and you deleted the Rojadirecta part so it just said  
21 www.sportsisus, the exact same thing would be playing.

22           THE COURT: But who puts the Rojadirecta on the URL?

23           MR. TANGRI: The URL is put there by Rojadirecta, but  
24 it does not have the content that is linked there on its site.

25           THE COURT: Does Rojadirecta run ads on the bottom,

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1 streaming a banner of ads, I guess you call them?

2 MR. TANGRI: No, your Honor. Those ads are run by the  
3 website that is streaming that content. Those ads are being  
4 run by the website that is streaming that content. In fact, if  
5 you were to perform the experiment I just described, you would  
6 see that even after you removed the Rojadirecta from the URL,  
7 and it's just www.sportsisus, the same banner ads remain, which  
8 shows you that they're coming from that originating website to  
9 which Rojadirecta is linking but which it does not control.

10 THE COURT: OK, go ahead. I have a few more  
11 questions, but I won't interrupt you. Why don't you go ahead  
12 and finish.

13 MR. TANGRI: OK. So, I think because the government  
14 appreciates what we have just been discussing, I believe that's  
15 why they -- and in light of the briefing that we put in in our  
16 opening brief -- have moved from arguing that Rojadirecta  
17 itself or Puerto 80 itself is committing criminal copyright  
18 infringement to allege these other websites are doing it, and  
19 what Rojadirecta is doing they contend is facilitating that.  
20 So, they point to the facilitation prong of the forfeiture  
21 statute as now being the basis for their complaint. As I said,  
22 that's not what is literally pled in the complaint, but we  
23 should address it because it's where we are today, and it's  
24 what they have argued in their opposition brief.

25 And the problem with that, and the reason that those

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1 allegations would not state a claim, is twofold: First, the  
2 complaint doesn't adequately allege, nor does the opposition  
3 brief adequately state a theory under which even those other  
4 websites are engaged in criminal copyright infringement,  
5 neither as a matter of the acts that they are performing, nor  
6 as a matter of the intent with which they are performing it.  
7 Second, the facilitation prong of the statute can't be read as  
8 broadly as the government would seek to read it here,  
9 particularly when what we are dealing with is a website that is  
10 engaged in expressive speech. And you are dealing with First  
11 Amendment concerns. The First Amendment constrains, we submit,  
12 the construction to facilitate on these facts.

13 THE COURT: I just give you a red alert here. You  
14 raised your First Amendment arguments in your reply brief, not  
15 in your original brief.

16 MR. TANGRI: I --

17 THE COURT: So, I'm not going to entertain First  
18 Amendment arguments here. You know, you knew about the First  
19 Amendment issue; it's in the papers that you filed back in the  
20 summer when you asked for release of the seized properties, and  
21 I invited at that time you to talk about First Amendment in the  
22 motion to dismiss, and you didn't say anything about the First  
23 Amendment arguments, which might very well have traction until  
24 the reply brief. So, the government hasn't had an opportunity  
25 to respond, so on this motion right here, Mr. Tangri, I'm not

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1 going to consider the First Amendment arguments. I just want  
2 you to know that.

3 MR. TANGRI: I hear your Honor. Let me just say on  
4 that point that the only reason -- just to be as clear as we  
5 can about it -- the only purpose for which we are addressing  
6 the First Amendment, and the only purpose for which we  
7 addressed it in the reply brief, goes to the construction of  
8 the term facilitation. And the fact that what Roja was being  
9 accused of in this complaint was facilitation and not criminal  
10 copyright infringement in its own right was something that came  
11 up in the government's opposition brief. And as I argued, it's  
12 not pled in there.

13 So, we did make a separate First Amendment argument  
14 before. We didn't read it as applicable to the motion to  
15 dismiss as charged until we got the opposition brief and they  
16 shifted to facilitation. And all we are arguing it for is the  
17 line of cases that says one should construe this statute to  
18 avoid constitutional issues. And this is a different argument  
19 than the First Amendment argument we ran before. So, just by  
20 way of explanation.

21 THE COURT: I appreciate the clarification.

22 MR. TANGRI: Returning to copyright infringement and  
23 the reason why neither the complaint nor the opposition brief  
24 articulates a theory under which even these unknown, unnamed,  
25 unidentified third-party websites can be alleged to be

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1 committing criminal copyright infringement.

2                   The Copyright Act gives copyright holders certain  
3 defined rights. It proscribes certain defined conduct by  
4 others.

5                   The right that the government appears to be alleging  
6 or arguing was violated here was the distribution right. They  
7 are saying that the third-party websites distributed copies of  
8 the alleged infringing sports telecasts.

9                   The distribution right to be violated requires that a  
10 copy be disseminated. A broadcast is not a copy. A copy has  
11 to be fixed in a tangible medium for longer than a transitory  
12 duration, and under cases such as the Arista v. MP3 Board case  
13 decided in this district, under the Cartoon Network v. CSC in  
14 the Second Circuit, commonly known as the Cablevision case, and  
15 under Agee v. Paramount, also in this Circuit, streaming or  
16 broadcasting does not amount to distribution; it does not  
17 violate the distribution right because no --

18                  THE COURT: I am really not very sophisticated in  
19 these matters, Mr. Tangri, but when I watch the Yankees games  
20 on TV periodically you get this little announcement from the  
21 announcer who says, you know, broadcast rights are restricted  
22 and, you know, they are owned by the Yankees, and you can't  
23 rebroadcast them without specific authorization. So, I have  
24 always assumed that if you used the Yankee signal on the YES  
25 network out their authorization you have somehow violated the

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1 law. Are you telling me that's not so?

2 MR. TANGRI: I am not necessarily telling you that's  
3 not so, your Honor. It depends on who does it and what they  
4 do. And what the government's opposition brief and complaint  
5 alleges is that the distribution right is violated. So, if you  
6 make a videotape or a DVD of the Yankees game, and you make a  
7 lot of copies of it, and you sell it out of the back of your  
8 car or some other way, selling copies of the thing, you may  
9 well be violating the distribution right because you are  
10 distributing a copy. There is a tangible thing, the  
11 copyrighted work is fixed in that tangible medium, and it's  
12 being distributed to somebody.

13 THE COURT: I have to make a copy?

14 MR. TANGRI: Yes. The distribution rights --

15 THE COURT: What if I just gather the signal and  
16 broadcast it further?

17 MR. TANGRI: That does not violate the distribution  
18 right, your Honor. That is precisely the holding of the case.

19 THE COURT: That's the Cablevision case?

20 MR. TANGRI: That's the Cablevision case, your Honor.  
21 That's what was being done there, and they said not a  
22 distribution. It may be some other things but not a  
23 distribution. And distribution is the offense that the  
24 government has elected to proceed under. And as to these  
25 unknown third-party websites the allegations are not sufficient

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1 to show distribution because there's nothing about a copy.

2 The complaint also importantly does not allege that  
3 any of those unknown, unidentified websites is within the  
4 United States.

5 And copyright law -- again we put the cases in our  
6 opening papers -- is territorially limited in its application.  
7 The act of infringement has to take place within the United  
8 States. The government responded that the domain names were  
9 registered here. But the domain names are not the act of  
10 infringement -- the alleged act of criminal copyright  
11 infringement. Again, this is the streaming of these  
12 broadcasts, and that's happening from some unidentified place  
13 which I think everyone assumes is overseas.

14 THE COURT: Well, again to go back to what you filed  
15 this summer. You said you wanted the domain names back because  
16 you were being injured here in the United States. Isn't that a  
17 concession that the copyright infringement was having an impact  
18 here in the United States?

19 MR. TANGRI: The fact of whether -- I mean -- no, it's  
20 not, your Honor, because what has to be shown is that the acts  
21 constituting infringement are taking place in the United  
22 States. The acts constituting infringement here are alleged to  
23 be taken by these third-party sites, streaming sites. There is  
24 no allegation that they are in the United States.

25 THE COURT: Mr. Miller?

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1 MR. MILLER: I apologize, your Honor.

2 THE COURT: You are going to have to turn off your  
3 phone. You are not supposed to have it on in the courtroom.

4 MR. MILLER: I didn't realize it was on, your Honor;  
5 in fact I always turn it off, so I'm turning it off right now.

6 THE COURT: You didn't know it was turned on? It's  
7 on.

8 MR. MILLER: I apologize.

9 THE COURT: All right. Go ahead, Mr. Tangri.

10 MR. TANGRI: I was trying to just keep going and hope  
11 nobody would notice. We have all been there or worry about  
12 being there, so...

13 The Perfect Ten case, your Honor, that we cited in our  
14 opening brief holds the geographic point that I am addressing  
15 now, that the locus of the infringing activity is what you look  
16 to for whether the territorial application of the Copyright Act  
17 has been exceeded. It is not merely an effects test as one  
18 thinks about for personal jurisdiction purposes in some cases.  
19 You have to look at where the copyright infringement took  
20 place, and here there is no indication it happened in the U.S.

21 The next point as to why the government hasn't alleged  
22 in the complaint or proffered arguments in opposition to  
23 establish criminal copyright infringement by these third-party  
24 websites goes to willfulness.

25 criminal copyright infringement has to be willful.

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1 It's willful in the strong sense of the word. It's not general  
2 scienter; it's specific intent. It's like cheat and screws in  
3 the criminal context. And the government I don't think  
4 disputes this. Both parties acknowledge that it was once  
5 otherwise in the Second Circuit in 1943, but amendments to the  
6 Copyright Act since then superseded that. More recent Second  
7 Circuit cases cited by both us and the government, including  
8 the Twin Peaks case from the early '90s, make clear that it's a  
9 specific intent standard to establish willfulness.

10 THE COURT: And the government also says they disagree  
11 with you. They say if we don't have willfulness, allow us to  
12 amend the complaint.

13 MR. TANGRI: I think, your Honor, that goes to the  
14 formal locution. And I'm trying to address here the fact that  
15 a bare allegation of willfulness isn't going to cut it under  
16 Iqbal and Twombly -- which everyone acknowledges applies to  
17 this. There is discussion in the papers of the pleading  
18 standards for these complaints is perhaps even higher than  
19 that. A legal conclusion like that would be disregarded. In  
20 fact Iqbal was a mental intent, what was the intent of the  
21 government; and the bare bones allegation was what was held to  
22 be insufficient. You had to have facts from which, if  
23 believed, someone could infer intent. And here they haven't  
24 proffered any. So, that's the key point.

25 They have talked somewhat in their papers about

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1 Rojadirecta's intent. That doesn't work. If Rojadirecta is  
2 not the actor accused of taking the acts that constitute  
3 criminal copyright infringement, you cannot graft its alleged  
4 intent to the acts of some third party, unknown, unidentified  
5 website, and cobble both actus reus and mens rea together; they  
6 need to reside in the same person.

7 THE COURT: What do you say about the allegation that  
8 you purposefully entered in extremely specific and illegal  
9 content and actively organized the material in a focused and  
10 logical manner?

11 MR. TANGRI: Rojadirecta -- I believe it's agreed --  
12 did not aggregate illegal content. There is no allegation that  
13 any of these sports telecasts are contained on or being  
14 streamed from Rojadirecta's servers.

15 There is an allegation that we organized links or that  
16 the site organizes links to these other websites that we are  
17 discussing. Again that, if it's an allegation about anything,  
18 it may be an allegation about our intent, Rojadirecta's intent.  
19 We can talk in a moment about who else does similar things, but  
20 that's not sufficient to be an allegation about the intent of  
21 the actors who are now being alleged to have committed the acts  
22 that the government would have form the basis of criminal  
23 copyright infringement, the third-party websites.

24 THE COURT: Well, assuming that somebody else is  
25 actually doing the actual infringement, what do you say about

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1 your role in actively assembling information from all over and  
2 gathering up or harvesting Internet users on their computers  
3 and providing them a facility for getting to this illegal  
4 material that's wrongfully distributed, copyrighted material?

5 MR. TANGRI: Again, I've discussed the distribution  
6 point, so I won't rehash that. But what we say about that,  
7 your Honor, is that that is not meaningfully different. I mean  
8 that is the backbone of the Internet. Linking from site to  
9 site is how the Internet works, and any search engine -- if you  
10 were to go to any search engine, Bing, Microsoft's search  
11 engine, Yahoo's search engine, anyone's search engine, and  
12 enter the name of the football game or baseball game, Yankees  
13 v. Devil Rays, whatever it is, and the dated, you will get a  
14 list of sites. It creates that index on the fly dynamically,  
15 but it creates it nevertheless.

16 We put examples in our papers of other sites that link  
17 to all sorts of content on the Internet, and any of that can be  
18 alleged to be infringing.

19 THE COURT: So, in your view, Mr. Tangri, linking is  
20 never enough.

21 MR. TANGRI: It's not just my view, your Honor, but we  
22 cited in the opening papers cases from this circuit holding  
23 that linking does not constitute direct infringement.

24 And the reason the direct infringement point is  
25 important is that -- as everyone I think has acknowledged

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1 here -- there is no criminal indirect infringement. There is  
2 no criminal contributory infringement, there is no criminal  
3 vicarious infringement, there is no criminal inducing  
4 infringement. The only form of copyright infringement that  
5 will support a criminal charge is direct infringement, and the  
6 law is very clear that linking does not constitute direct  
7 infringement. It may in the civil context be something else,  
8 but those "something elses" are not the basis in criminal  
9 charges for copyright.

10 THE COURT: Do you want to take two minutes and sum  
11 up, and then I will give you some time for rebuttal after we  
12 hear from the government.

13 MR. TANGRI: Yes, your Honor. I just want to say in  
14 response to what it says in the Yankees telecast point that  
15 your Honor raised, I think that best goes to the willfulness  
16 argument, saying, well, somebody must have that telecast, they  
17 must have heard that. The law is clear -- and this is again in  
18 the reply brief -- that that is not sufficient to show an act  
19 of infringement and then argue that because the infringement  
20 has been proven willfulness is also proven.

21 THE COURT: Well, what if somebody went to you -- not  
22 to you, Mr. Tangri -- but to your client, to Puerto 80 or  
23 Rojadirecta -- and said somebody from Major League Baseball or  
24 National Hockey League or the football people, and said, you  
25 know, you are streaming our content and it's wrong, you are

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1 violating our copyright, we want you to stop; and you say --  
2 you know, you don't do what they ask you to do, and you keep on  
3 making the content available. Does that make it willful? I  
4 mean now you know.

5 MR. TANGRI: Well, the first thing I would say, your  
6 Honor, is I think we would again say we're not streaming it.

7 THE COURT: Yes, I understand.

8 MR. TANGRI: Getting past that point --

9 THE COURT: Getting past that point -- which is a big  
10 hurdle to get over -- but if you are past that point now, you  
11 have been told, you have been told specifically.

12 MR. TANGRI: And the cases that the government  
13 cites -- they cite two cases. One is called Getaped, and one  
14 is Castle Rock -- those cases provide some support for that  
15 notion when you are dealing with a specific work.

16 So, if a copyright order goes to a website and they  
17 say you have a copy of my movie, for example, once or something  
18 up there, and that's an infringing copy, please take it down,  
19 and the website doesn't take it down, that can be evidence  
20 of -- not inclusive on -- but evidence of willfulness.

21 The cases distinguish between that circumstance and  
22 the circumstance where a more general notice is provided, hey,  
23 we copyright all our movies, we copyright all our sports  
24 telecasts, therefore if you have any of them, it's willful.  
25 That has been held to be not sufficient, and one of the reasons

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1 it's been held to be not sufficient is Section 506(a)(2), which  
2 is the section I was referring to earlier which says simply  
3 having knowledge of infringement or proof of infringement  
4 doesn't suffice to get you willfulness.

5 Another reason is the point that I started to make at  
6 the beginning when you raised the example of the Yankees  
7 telecast with the language that comes up in it. There are  
8 plenty of places you can go on the Internet -- Yahoo Sports, a  
9 major American corporation that has a deal with various  
10 sporting leagues to broadcast their content; ESPN and others --  
11 you can find plenty of lawfully streamed sporting content on  
12 the Internet, and you can link to it. Somebody else can link  
13 to it, and at that point you are not linking to an infringing  
14 work, you are linking to an authorized display of copyrighted  
15 work. And the evidence and the allegations in the complaint is  
16 that this cite, the Rojadirecta site, allows users to post  
17 links to it.

18 The final thing I would say is that the complaint  
19 itself sort of acknowledges this. When it describes the  
20 actions undertaken by the agents who performed the  
21 investigation, the complaint strongly implies that the agents  
22 didn't know at the time they were watching these streaming  
23 broadcasts that they had linked to via Roja's site that they  
24 were unauthorized. The complaint goes on to say after they  
25 watched them that they contacted the leagues and asked about

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1 the individual ones that they had seen, and they were informed  
2 that those were not authorized to be on the Internet on those  
3 dates and times.

4 That I think is an example of why one can't just infer  
5 from the presence of content that asserts that it is subject to  
6 copyright, that having it up there is willful infringement,  
7 much less linking to it.

8 THE COURT: Thank you, Mr. Tangri.

9 Mr. Fryer or Mr. Miller?

10 MR. FREY: Yes. Thank you, your Honor.

11 Your Honor, I want to start where Mr. Tangri started,  
12 and that's with paragraph 24 of the complaint.

13 Paragraph 24 makes clear that it is in the  
14 government's allegations the defendant domain names that are  
15 subject to forfeiture. And those defendant domain names refer  
16 to two pieces of property: Rojadirecta.org, Rojadirecta.com.  
17 And, as a result, this is an in rem proceeding, it is a  
18 proceeding against property, which obviously is a little  
19 unusual and perhaps unfamiliar to most of us. And it further  
20 alleges that it is those domain names that constitute property  
21 used or intended to be used to willfully infringe copyright in  
22 violation under the criminal copyright statute.

23 THE COURT: How do they do that?

24 MR. FREY: How do they do that?

25 THE COURT: They just provide a link, as Mr. Tangri

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1 said.

2 MR. TANGRI: Well, the website, the Rojadirecta  
3 website, provides links. The domain names direct you as the  
4 Internet user to that website.

5 THE COURT: As I understand it, I can go on  
6 Rojadirecta.org or .com and get a list of events, and that's  
7 all it is, it's a list. Is that correct so far? And then I  
8 have to hit one of those events that I want to see, and that  
9 creates a link that takes me to another site. Correct?

10 MR. FREY: Well, your Honor, the links are created  
11 already on the site and, you're right, what the website does is  
12 it organizes links to various sporting events, it updates those  
13 links as the day progresses and as sporting events draw near in  
14 time.

15 THE COURT: So, when I go onto the Rojadirecta.org or  
16 .com site, I don't see any events, I just see the list.

17 MR. FREY: That's correct, your Honor.

18 THE COURT: I see curling from Canada.

19 MR. FREY: You might see curling from Canada.

20 THE COURT: Or women's volleyball from Saudi Arabia,  
21 or some kind of remote event in Abu Dhabi.

22 MR. FREY: Yes. And what you will also see, your  
23 Honor, is American basketball games, American baseball games,  
24 American football games, links to view those individual  
25 sporting events.

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1                   THE COURT: Are we to assume -- what is the copyright  
2 infringement here though? Is it the link or what the link  
3 takes you to? And what about Mr. Tangri's point that some of  
4 the sites that you are taken to are legitimate sites, in other  
5 words, they have the appropriate permissions or they are within  
6 some kind of fair use doctrine, or they are not distributing  
7 the content under the Cablevision decision, so you are watching  
8 something that's perfectly lawful?

9                   MR. FREY: Let me address a couple of those points,  
10 your Honor.

11                  First, based on the captures that are set forth in the  
12 complaint, the actual events that the agents themselves  
13 streamed using the Rojadirecta domain names, therefore going to  
14 the Rojadirecta website, none of those were authorized. Those  
15 broadcasts that they were able to view using the Rojadirecta  
16 website, none of those were authorized by the relevant  
17 copyright holders.

18                  While there may be here and there an authorized  
19 broadcast, that's certainly not what the complaint alleges.  
20 And there is enough in the complaint to support the fact that  
21 what is being distributed, what is being set forth over the  
22 Internet is actually unauthorized copyrighted material.

23                  The other thing that -- and I think this is important  
24 as well because the complaint alleges this --

25                  THE COURT: But the mechanism, the computer or the

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1 server which is broadcasting or disseminating or distributing  
2 this illegally copied material in violation of the copyright is  
3 not Rojadirecta. It's not their server, is it?

4 MR. FREY: I don't think the complaint says that it's  
5 hosted on the Rojadirecta's server, your Honor. What it says  
6 is that Rojadirecta, the domain names, are facilitating  
7 criminal copyright infringement. So, let me address two  
8 related points on that.

9 The government has not shifted its position. It has  
10 consistently taken the position that Rojadirecta, its operator  
11 Puerto 80, are engaged in aiding and abetting. It's a theory  
12 of criminal liability.

13 THE COURT: So, I mean the government must show the  
14 following things: The existence of a valid copyright. Mr.  
15 Tangri doesn't really complain about that. He says that's an  
16 allegation in the complaint. But what is the willful act of  
17 infringement here?

18 MR. FREY: It is the distribution of those -- the  
19 broadcast of those sporting events.

20 Now, there is a section on the Rojadirecta web page  
21 that has live sporting events, events that are being broadcast  
22 in real time, but there is also a section -- as paragraph 14(a)  
23 of the complaint sets forth -- a section where one can download  
24 last full matches. It is not a real time broadcast of the  
25 event, it is a download or a stream of a copy, that very copy

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1 that Mr. Tangri is referring to, that is being transmitted.

2 Someone recorded that and is then retransmitting it across the  
3 Internet, and the Rojadirecta domain names are facilitating  
4 that. They are aiding and abetting that direct copyright  
5 infringement.

6 It's not the case, as paragraph 14 --

7 THE COURT: Where in your complaint do you allege  
8 aiding and abetting? I thought you were suggesting that what  
9 Rojadirecta did itself was not contributory but was an actual  
10 act of direct infringement.

11 MR. FREY: I think, your Honor, the way that the  
12 complaint is pled is that it's pled alternatively. It's pled  
13 as a direct infringement, but to the extent that that argument  
14 fails, aiding and abetting liabilities or accessory liability  
15 is a perfectly appropriate way and, to be quite frank, a common  
16 way in which the government routinely proves criminal liability  
17 and would prove criminal liability under the criminal copyright  
18 statute.

19 THE COURT: But you are not pursuing criminal  
20 liability here, right?

21 MR. FREY: At this point, no, your Honor, we are not.  
22 And I think that's an important point as well, and that being  
23 that the government doesn't have to prosecute or convict anyone  
24 of the underlying crime in order to seek forfeiture of property  
25 that's being used.

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1           THE COURT: Well, if you were going to prosecute the  
2 underlying crime, who would you indict?

3           MR. FREY: We are here in the world of pure  
4 speculation? I don't know the answer to that, your Honor. I  
5 think there is an argument --

6           THE COURT: Well, would you indict Rojadirecta.com?

7           MR. FREY: No, I don't think it would be the website,  
8 your Honor. I think it would probably be the owner -- the  
9 operator of the website that we would be seeking an indictment  
10 against.

11          THE COURT: A human being.

12          MR. FREY: A human being, yes. I think that's likely  
13 what would happen.

14          Your Honor correctly noted that the URL, as set forth  
15 in the complaint at paragraph 14(c), undermines the fact that  
16 you are taken to an entirely different website.

17          Some of what Puerto 80 is asserting to me seem like  
18 questions of fact, questions that would need to be resolved in  
19 a period of discovery. The government has set forth  
20 allegations, a fair inference from which could be drawn that  
21 it's Puerto 80 or the Rojadirecta website itself that's hosting  
22 some of this material, perhaps even some of the download of the  
23 last full matches, based on the fact that the URL begins with  
24 Rojadirecta.

25          The way that the complaint is pled also in paragraph

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1       14 indicates the agent's understanding or at least what was  
2       apparent to the agents who did the downloads, that it was  
3       Rojadirecta that was appending advertisements to these  
4       broadcasts and not that were being appended by some other  
5       entity at another website.

6                 THE COURT: Let me ask you a question. Mr. Tangri  
7       said that Rojadirecta was not responsible for the banner on the  
8       offending material. And I was assuming reading your  
9       complaint -- you're right, Mr. Frey, this is a factual matter.  
10      But where is the financial gain to Rojadirecta? Does there  
11      have to be a financial gain here as well?

12                MR. FREY: Your Honor, I think the complaint does  
13      contain allegations in a more general sense that revenue is  
14      generated from advertisement. It does not specifically allege  
15      that Rojadirecta in placing those advertisements generated  
16      revenue. That is perhaps admittedly a deficiency in the way  
17      that the complaint is pled, and if leave were granted that  
18      could be corrected.

19                This are certainly though allegations in the beginning  
20      portion of the complaint, under the title of "law enforcement's  
21      investigation" where it describes generally how these sites  
22      work and generally the reason why the operation of these  
23      websites is profitable, why an entity such as Puerto 80 would  
24      be seeking to receive the return of those domain names, why  
25      it's important to them.

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1           The other point, your Honor, that I wanted to address  
2 is the extraterritoriality point of the copyright law that Mr.  
3 Tangri referred to. And I think in the Second Circuit there is  
4 pretty clear case law that it's not seriously disputed that  
5 U.S. copyright laws do not have extraterritorial effect and  
6 that infringing acts that take place entirely outside the  
7 United States are not actionable. However, the Second Circuit  
8 has also recognized an exception where claims of U.S. copyright  
9 law infringement can be based where at least in part there is a  
10 predicate infringing act that occurs in the United States.

11           THE COURT: Well, if I were to go on Rojadirecta, notwithstanding the fact that you seized .com and .org, I could  
12 still get Rojadirecta, couldn't I?

14           MR. FREY: Today, yes, you can.

15           THE COURT: Here in the United States?

16           MR. FREY: Here in the United States. Not through  
17 domain names that are controlled by any entity in the United  
18 States.

19           THE COURT: Well, why under your argument is this  
20 subject to American jurisdiction if I can get it today in New  
21 York?

22           MR. FREY: Well, the government at this point in time  
23 anyway does not have the ability to seize those domain names  
24 that are registered through registrars overseas, but it does  
25 have the ability to seize those domain names that are

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1 registered here in the United States.

2 THE COURT: So your predicate for jurisdiction is the  
3 same; your power to execute though is more limited because the  
4 name is beyond the reach of the marshal. Is that it?

5 MR. FREY: Well, not only beyond the reach of the  
6 marshal but beyond what Congress has authorized. We have the  
7 authority to seize property located here in the United States;  
8 we don't have that same authority abroad.

9 But my point with the fact that there are certainly  
10 inferences to be drawn at the very least from the complaint to  
11 suggest that there are predicate infringing acts occurring here  
12 in the United States is that what the government is concerned  
13 with here is infringement on copyrighted material of U.S.  
14 copyright holders. And, again, those are the NBA games, the  
15 NFL games, the NHL games, and those are broadcasts of events  
16 that are occurring in the United States, broadcasts that are  
17 more likely than not occurring here in the United States. It  
18 is a very likely inference that copies of those broadcasts are  
19 being made here in the United States and are being sent  
20 overseas. But there are certainly enough inferences from what  
21 is pled in the complaint to find that there are predicate  
22 infringing acts here in the United States.

23 I also wanted to note to the court a case that I  
24 recently came across, that is the Kamen case, a Second Circuit  
25 decision, 791 F.2d 1006, that suggests that in resolving some

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1 of these jurisdictional questions or these questions of  
2 extraterritoriality, some limited discovery might be  
3 appropriate because there are often times questions for which  
4 the answers lie with the claimant.

5 THE COURT: Well, you are just about finished, Mr.  
6 Frey? Because I have some questions for you.

7 MR. FREY: Yes, please.

8 THE COURT: Now, the prerequisites here for copyright  
9 is there has to be a valid copyright. There is no dispute that  
10 this material -- at least according to the allegations --  
11 there's a valid copyright for it. Then there has to be an act  
12 of infringement which is willful on the part of the infringer.  
13 Mr. Tangri makes the points that linking is not a direct  
14 infringement, there is no criminal offense for contributory  
15 infringement. What do you say about those arguments?

16 MR. FREY: Again, your Honor, I think we disagree  
17 about the nature of the infringing act. I think unauthorized  
18 distribution is in fact an infringing act. Certainly in the  
19 criminal context there is no case in the Second Circuit that I  
20 am aware of that rules out streaming from the concept of  
21 distribution. Again, not only though on the website are these  
22 live feeds, but there is also the downloading of last matches,  
23 which would seem to me to be an act of distribution.

24 THE COURT: And what do you say about the argument  
25 that linking is not direct infringement?

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1                   MR. FREY: I think under an aiding and abetting theory  
2 it is. I think it is direct infringement under an aiding and  
3 abetting theory.

4                   THE COURT: And what about the argument that there is  
5 no criminal offense for contributory infringement?

6                   MR. FREY: There is no statutory offense for  
7 contributory copyright infringement. There is certainly  
8 general theories of secondary liability including aiding and  
9 abetting, conspiracies.

10                  THE COURT: Yes.

11                  MR. FREY: And that is I think a theory that is  
12 supported by the allegations in the complaint, your Honor.

13                  THE COURT: And what about Mr. Tangri's argument about  
14 allegations of willfulness? You concede, don't you, that you  
15 really ought to replead willfulness?

16                  MR. FREY: I think that's fair, your Honor. I think  
17 the government would be able to do more than make a bare  
18 allegation as to willfulness in pleading, but I also think that  
19 beyond that question of willfulness and whether copyright  
20 notices on the broadcasts themselves or whether the take-down  
21 notices, if you will, that were provided to the websites such  
22 as Rojadirecta that placed them on notice that they were  
23 distributing infringing material and they should take those  
24 down, and then that was never done, I think those will be  
25 factual issues that will need to be resolved about whether or

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1 not that is evidence of willfulness -- of intent.

2 THE COURT: And where is Rojadirecta.com and .org's  
3 financial gain?

4 MR. FREY: Again --

5 THE COURT: Under 506 there has to be some kind of  
6 financial gain, doesn't there? It has to be for purposes of --

7 MR. FREY: -- purposes of commercial advantage and  
8 financial gain. There is certainly evidence -- and there is  
9 some allude to, though not directly, with respect to  
10 Rojadirecta, which is the linking sites in general -- that they  
11 gained revenue from advertisements, but beyond that there is  
12 also case law that they don't have to realize commercial gain.  
13 If it was intended, if that was their purpose, then that is  
14 sufficient.

15 You know, your Honor, there was a lot to be made in  
16 Puerto 80's reply brief about what I will call the doomsday  
17 scenario, that, you know, if the government's interpretation of  
18 the forfeiture statute is what it is, then there is nothing  
19 from stopping the government from seizing and shutting down  
20 basically the Internet, from taking sites like -- Google, for  
21 example is often a popularly cited example -- what's to stop  
22 the government from taking Google.

23 Well, you know, the language of the forfeiture statute  
24 is broad, but courts have recognized that the connection  
25 between the property -- the Rojadirecta domain names in this

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1 case, the Google domain case in the Google hypothetical -- and  
2 the crime have to be more than de minimis. And I don't think  
3 there is any allegation or any plausible argument that what  
4 Google does is substantially connected to infringing copyright  
5 infringement.

6 THE COURT: This is what you mean by the difference  
7 between Google and the Rojadirecta is that Rojadirecta  
8 purposefully aggregates extremely specific content and actively  
9 organizes the material in a focused, logical manner. This is  
10 not what Google does.

11 MR. FREY: Exactly, your Honor. The displaying of  
12 links is incidental to Google's services; it is not what  
13 Rojadirecta does; it is not creating and updating on an hourly  
14 or daily basis links to copyright infringing material. And  
15 Google has a continuing obligation to remove links when it  
16 becomes aware that those links link to infringing material.  
17 That is very different than what Rojadirecta does.

18 And I think that the court's recognition of that  
19 substantial connection between the property at issue -- the  
20 property that the government is seeking to forfeit -- and the  
21 criminal offense, would prevent this doomsday scenario that  
22 Puerto 80 is trying to flag for the court.

23 THE COURT: All right. Thank you.

24 Anything else, Mr. Frey?

25 MR. FREY: No, your Honor, unless the court has

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1 further questions.

2 THE COURT: Mr. Tangri?

3 MR. TANGRI: Yes, your Honor, if I may.

4 On aiding and abetting, aiding and abetting is not a  
5 crime for which forfeiture is permitted under the statute under  
6 which the government is proceeding. They are proceeding under  
7 Section 2323. That statute enumerates certain crimes touching  
8 on the Copyright Act for which forfeiture may be permitted.

9 Aiding and abetting is not among them. And so we're back  
10 respectfully a bit to the mixing and matching of theories and  
11 actors.

12 THE COURT: You base that argument as saying -- what  
13 did you base that on? It says under 2323(a) you have to cite a  
14 violation to an enumerated statute? Is that it?

15 MR. TANGRI: Yes.

16 THE COURT: And 2 is not among them?

17 MR. TANGRI: Correct. Nor is 371. And there are  
18 other forfeiture statutes, including 981 (a)(1)(A) and  
19 (a)(1)(C) which do reference 371 or reference crimes which in  
20 turn expressly incorporate 371. So, it's not an oversight on  
21 the part of Congress. As Mr. Frey made the point, Congress has  
22 given them certain authority and not more. Aiding and abetting  
23 doesn't support forfeiture in this context. For other crimes  
24 yes, not here.

25 On the distribution point, your Honor, we cited the

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1 law that says that streaming does not amount to a distribution,  
2 and I think that's clear in this Circuit.

3 Mr. Frey has made reference to one line in the  
4 complaint that says there is a button on the Rojas site or a  
5 place on the Rojas site that says something about download  
6 recent matches. The theory of the complaint and the theory of  
7 the opposition brief has been entirely around distribution by  
8 streaming. There is detailed allegations about streaming,  
9 detailed allegations of facts about what the agents saw when  
10 they were streaming. It's all about streaming. The complaint  
11 doesn't plead and it can't be fairly read to plead this  
12 downloading piece. But if it did, the law is also clear here  
13 that the website that makes material available for download --  
14 and again that's not Rojadirecta; that's whatever they refer to  
15 them as cyber locker sites where things are kept in the  
16 government's complaint. They make an express reference to  
17 cyber locker sites.

18 THE COURT: Tell me again what a cyber locker site is.  
19 That's the actual server where the materials are stored?

20 MR. TANGRI: Yes, that is a website that allows people  
21 to store large file content like a sports telecast on the  
22 website's own server and allows that person or others to  
23 download it. And they say Rojadirecta is not a cyber locker  
24 site, they say it's a linking site, and then they talk about  
25 the fact that it links to streaming sites, and they describe

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1 how that works.

2           But even if you were to conclude -- I mean even if you  
3 want to look at the fact and say, OK, so somewhere there is a  
4 cyber locker site -- we don't know what it is, and we haven't  
5 really pled that Rojadirecta links to it, but maybe there is an  
6 inference to be made there -- the argument then becomes is that  
7 site engaged in infringement by having that material there  
8 perhaps to be downloaded. And the answer again under this  
9 Circuit's precedence is, no. The *Cablevision* case, as well as  
10 the *United States v. American Society of Composers, Authors and*  
11 *Publishers*, 627 F.3d 64 (2d Cir. 2010), hold that it's the  
12 volitional act that must be taken to download something that  
13 makes it a violation of the distribution right; it's not having  
14 it available on a server to be downloaded. Merely having  
15 something available on a server to be downloaded is not  
16 distribution under those precedents.

17           On the question whether they do or do not allege that  
18 Rojadirecta has this material itself, I think the clearest  
19 place in the complaint is paragraph 14(c), in which they allege  
20 the content ran on a live stream from another website.

21           THE COURT: I see that.

22           MR. TANGRI: On the extraterritorial point, I just  
23 want to be as clear as I can on the law. It's different law  
24 than the standard test for jurisdiction. I think we're more  
25 familiar, all of us, with the effects test where even under the

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1 antitrust laws, for example, a conspiracy in Europe can affect  
2 prices in the United States, and you can prosecute Europeans  
3 under American law, or you can bring a civil claim under the  
4 Sherman Act under American law. That is a different concept  
5 than the extraterritorial reach of a statute.

6 Congress has chosen to cause the Copyright Act to  
7 apply only to acts of infringement taken within the United  
8 States, not to have it apply to acts of infringement taken  
9 abroad that may nevertheless may have an impact on the market  
10 in the United States or the price of goods in the United States  
11 or some other economic interest in the United States.

12 The actus reus has to take place here, and that's what  
13 is not alleged, and I believe people recognize that the actual  
14 infringement is happening -- the hosting of this material is  
15 being hosted on servers outside the United States.

16 THE COURT: How do we know that?

17 MR. TANGRI: Well, we know that it's not alleged in  
18 the complaint to be done within the United States. I mean that  
19 is within the four corners of the 12(b)(6) procedure what we  
20 know at this point.

21 I believe that there are allegations in the complaint  
22 that Rojadirecta's own server is located in Canada. That again  
23 isn't where the infringing material is; that's just where the  
24 links are. But the only server that's alleged is one that's  
25 out of the country. And there is no allegations about the

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1 locations of the servers that actually host the infringing  
2 content that are maintained by these unidentified third-party  
3 streaming sites. But in the absence of such an allegation, and  
4 given the other allegations in the complaint --

5 THE COURT: It's a very strange world where assuming  
6 that the NHL has copyrights to its hockey games, and they are  
7 played here in the United States and broadcast here in the  
8 United States, somebody picks them up in a server in Canada,  
9 and another server in Kazakhstan, and then rebroadcast, picked  
10 up here in the United States by virtue of computers, so you  
11 would say there would be no remedy for that kind of copyright  
12 infringement because all the infringing acts took place outside  
13 the United States?

14 MR. TANGRI: I'm not saying exactly that, your Honor.

15 THE COURT: Even though the damages occurred  
16 exclusively in the United States.

17 MR. TANGRI: It may well be, your Honor, that there is  
18 a remedy. As I said, there are civil remedies for secondary  
19 copyright infringement, vicarious, contributory inducement.  
20 There are the civil copyright laws.

21 THE COURT: No, I am talking about criminal  
22 enforcement.

23 MR. TANGRI: The criminal law, Congress has chosen to  
24 make it more narrow and not to include -- other than perhaps  
25 under Section 2 or Section 371 -- but not to include criminal

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1 liability for secondary infringement, and has chosen not to  
2 include Sections 2 and 371 in the forfeiture statute. Those  
3 are all choices that Congress has made.

4 THE COURT: Anything else?

5 MR. TANGRI: Your Honor, just that on this point about  
6 sort of the purposefully indexing things and maintaining an  
7 up-to-date list of links to this content, that is, with all  
8 respect, precisely what a search engine does only more so.

9 When you go to Yahoo or Microsoft's Bing, or any other  
10 search engine, and you enter your query, the page that you get  
11 back is a page of links. That's what it is. And you click on  
12 one of those links, and it takes you to somewhere. It does  
13 purposefully, it does it in response to your query, and it does  
14 it on an even more up-to-date basis than perhaps Rojadirecta,  
15 because they are constantly crawling and indexing the Internet,  
16 and it's returning the results in real time. So, what  
17 everyone's vision --

18 THE COURT: There is a difference though, isn't there?  
19 I mean normally when you have an inquiry, you type it into your  
20 search engine, and it comes back with a series of links. Here  
21 with Rojadirecta, as I understand it, based on the pleadings  
22 and what you have submitted, what Rojadirecta offers you is a  
23 series of links right away.

24 MR. TANGRI: Which is the same thing that Google News  
25 offers you, which is the same thing that a lot of Yahoo forum

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1 pages offer you. A lot of these big portal sites, or any site  
2 that aggregates, a lot of them have preset menus, if you will,  
3 and then you can do a custom order by simply typing in your  
4 search result, and then they will return you a series of  
5 indexed links that are highly relevant to your particular  
6 query.

7 THE COURT: All right. I appreciate the argument and  
8 the clarity of the briefs by Mr. Frey and Mr. Miller and you,  
9 Mr. Tangri, and your colleague Mr. Spears. I have read the  
10 party's briefs, and I have considered their arguments. I am  
11 now going to rule on the motion to dismiss.

12 The government seeks forfeiture of Rojadirecta Domain  
13 Names, pursuant to 18 U.S.C. 2323 (a)(1)(A) and (B). The  
14 government alleges that the Rojadirecta Domain Names constitute  
15 "property used, or intended be used" to "facilitate" the  
16 commission of criminal copyright infringement in violation of  
17 U.S.C. section 506 and 18 U.S.C. Section 2319.

18 To establish criminal infringement of copyright work,  
19 the government has to show the following factors: First, the  
20 existence of a valid copyright; second, an act of infringement  
21 of that copyright; three, willfulness on the part of the  
22 infringer; and, four, either that (a) the infringement was for  
23 the purpose of commercial advantage or private financial gain,  
24 or (b) the infringer reproduced or distributed during any  
25 180-day period one or more copies or phonorecords of one or

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1 more of the copyrighted works, with a total retail value of  
2 more than \$1,000. That's set forth at 17 U.S.C. Section  
3 506(a).

4 The government has sufficiently alleged the existence  
5 of a valid copyright to satisfy the first element. I don't  
6 think there is any dispute about that.

7 With respect to the second element, an "act of  
8 infringement," the government alleges that Rojadirecta Domain  
9 Names "purposefully aggregated extremely specific [illegal]  
10 content and actively organized the material in a focused,  
11 logical manner." The government's allegations at this stage  
12 are sufficient to show direct infringement because the Domain  
13 Names conduct involved a volitional aspect. Even if criminal  
14 copyright infringement cannot be based on allegations of  
15 "contributory infringement" -- and I do not so hold -- the  
16 government's allegations are still adequate. The government  
17 alleges that Rojadirecta Domain Names disseminated the  
18 copyrighted works by providing links which when clicked took  
19 the user to a new window bearing the URL "rojadirecta" that  
20 broadcast unlawful copies of live streaming sports events from  
21 another website. This is a sufficient allegation at this  
22 juncture that Rojadirecta Domain Names distributed the  
23 copyrighted works. That's in paragraph 14(c) of the complaint.

24 The government has not, however, sufficiently alleged  
25 that Rojadirecta Domain Names willfully infringed the

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1 copyright. The government argues that it can show willfulness  
2 by alleging the that copyright owners provided notice to  
3 Rojadirecta Domain Names requesting removal of the illegally  
4 posted content, and that despite this notice, the Domain Names  
5 continued to organize links to copyrighted athletic events.  
6 The government concedes that the complaint does not actually  
7 allege that the Domain Names or Puerto 80 received notice and  
8 that it may be preferable to amend the complaint to so state.  
9 Without these factual allegations, there is no basis to find  
10 that the Domain Names acted willfully.

11 The government has sufficiently alleged that the  
12 Domain Names' purported infringement was for the purposes of  
13 commercial advantage or private gain. Indeed, with respect to  
14 the purposes of commercial advantage, it's the word "purposes"  
15 that is important here, and money does not have to be earned,  
16 but at least at this stage, giving the benefit of the doubt to  
17 the pleadings and making all the assumptions in favor of the  
18 government at this time in response to the motion to dismiss, I  
19 don't know what other purpose there would be other than some  
20 kind of commercial purpose.

21 At any rate, the government alleges an allegation that  
22 when a link from the Domain Names' sites is accessed,  
23 advertisements that were separate and distinct from any  
24 commercials that may have been aired during the streaming of  
25 the sporting events were periodically displayed at the bottom

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1 of the video during the live stream is more than sufficient to  
2 establish that the infringement was for the purposes of  
3 commercial advantage or providing financial gain. The court  
4 also notes that Puerto 80 previously argued that the seizure of  
5 the Domain Names caused "a substantial hardship" on Puerto 80's  
6 lawful business in the United States.

7 In light of the defendants' prior argument seeking the  
8 release of the Domain Names, that its business in the United  
9 States was substantially impacted, the court finds at least at  
10 this stage the defendants' current arguments on  
11 extraterritoriality are not consistent, and in any event at  
12 this particular stage they are unsound. The government has  
13 alleged that the Domain Names were registered in Arizona; and  
14 provided links to illegal broadcasts of U.S. sporting events,  
15 which were accessible to viewers in the United States.  
16 Accordingly, the alleged infringement is sufficiently connected  
17 to the United States to render it actionable.

18 Finally, the court will not consider, as I have  
19 already indicated, defendants' first amendment arguments for  
20 the reasons I have already stated on the record. In light of  
21 the government's failure to adequately allege willfulness, the  
22 court grants the defendant's motion to dismiss. The court  
23 finds, however, that it is in the interests of justice, and  
24 pursuant to Rule 15(a) of the Federal Rules of Civil Procedure,  
25 to grant the government leave to replead.

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1           The government has to replead within how much time do  
2 you want, Mr. Frey?

3           MR. FREY: May I have a moment, your Honor?

4           THE COURT: Yes. I am thinking 30 days, Mr. Frey.

5           MR. FREY: That would be fine, your Honor.

6           THE COURT: 30 days to replead.

7           I think then you and Mr. Tangri ought to talk about  
8 some discovery. There may be a motion for summary judgment.

9           What do you foresee as the next step, Mr. Frey?

10          MR. MILLER: Your Honor, assuming that the court  
11 accepts the revised complaint which the government will file,  
12 we will confer with opposing counsel regarding a discovery  
13 schedule, and we would be prepared to propose one under I guess  
14 a Rule 16 conference, and then subsequently Rule 26 initial  
15 disclosures, and then ultimately envision document requests and  
16 depositions including of foreign sources of documents and  
17 possibly foreign witnesses. So, we anticipate from a discovery  
18 perspective that this could take a number of months given the  
19 possibility that evidence could be located abroad.

20          THE COURT: I will take a look at your schedule but  
21 I'm not going to let this case hang around for a long time.  
22 Mr. Tangri is entitled to an answer on his client's behalf.  
23 When was this matter started? In the summer?

24          MR. FREY: June the complaint was filed.

25          THE COURT: The seizure was back in February.

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1 MR. FREY: Sorry, your Honor?

2 THE COURT: The seizure was back in February.

3 MR. FREY: Yes, it was.

4 THE COURT: I think Mr. Tangri is entitled to an  
5 answer. So, I will just take a look, but you should keep that  
6 in mind. That's my inclination on this matter, to move this  
7 along promptly and not engage in a lot of discovery, because  
8 Rojadirecta.org and .com are entitled to an answer. OK, thank  
9 you very much.

10 MR. FREY: Thank you, your Honor.

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